Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1816

In The

Supreme Court of the United States

October Term, 1988

CITY OF BURLINGTON, VERMONT,

Petitioner,

v.

MOUNTAIN CABLE COMPANY,

Respondent.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Mountain Cable Company ("Mountain")[1] entered into an agreement in June of 1985 (the "Agreement") with the City of Burlington, Vermont ("City"). The Agreement was entered into in settlement of disputes between Mountain and the City. The City agreed to waive its claimed franchise right to establish a municipal cable system to serve Burlington and to dismiss an action seeking street excavation fees from Mountain in consideration for the payment of $1,000,000 and certain other undertakings by Mountain. Mountain agreed to pay a franchise fee of five percent of gross revenues derived within the City from the operation of the cable television system commencing after July 1, 1991.

The rate regulating provisions of ¶ 4.03 of the Agreement comprise one of Mountain's other undertakings. Mountain has increased its rates for basic cable service in a manner it believes to be consistent with the Agreement. The City chose to dispute the propriety of the initial rate

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[1] Per Rule 28.1, Mountain makes this disclosure: Mountain Cable Company ("MCC") is a Vermont limited partnership whose managing general partner is Pericles Communication Corporation ("Pericles"). Pericles is also the limited partner of MCC. In addition, there are two other general partners: Mountain Cable Communications Corporation, which is a Delaware corporation wholly-owned by Pericles, and Mr. Robert F. McGill, a natural person residing in Charlotte, Vermont. Chelsea Communication Corporation ("Chelsea") owns one hundred percent of Pericles. Adelphia Communications Corporation owns one hundred percent of Chelsea. Chelsea also has a controlling interest in numerous other cable television systems.

increase by commencing an action in the Vermont Superior Court.[2] Mountain did not argue that ¶ 4.03 of the Agreement was preempted by the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (the "Cable Act"), but the trial court raised the issue and its ruling that the rate regulating provisions are preempted by the Act was upheld by the Vermont Supreme Court.[3]

The Vermont Supreme Court held that the Cable Act prohibits the City, as a political subdivision of the State, from regulating rates charged by Mountain for basic cable service. Petitioner's App. at 5a. The Vermont Supreme Court, in *dicta*, went on to state its view that the City also constitutes a "franchising authority" within the definition of 47 U.S.C. § 522 and is subject to the Cable Act for that reason as well. Petitioner's App. at 6a.

The issue of waiver of statutory rights was first raised by the City in correspondence supplementing its brief to the Vermont Supreme Court, citing *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). The City's Motion for Reargument to the Vermont Supreme Court makes the waiver argument in more

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[2] *City of Burlington v. Mountain Cable Company*, State of Vermont Superior Court, Chittenden County, Docket No. S1190-86CnC.

[3] *City of Burlington v. Mountain Cable Company*, No. 87-156 (Vt. S. Ct., Nov. 10, 1988). Petitioner's App. at 8a. Though Mountain has felt constrained to argue that any portion of the Agreement lacks validity, it opposes the City's Petition in order to promote finality to this litigation. The rates in controversy went into effect January 1, 1987, and Mountain's current billing practices are predicated on its belief that the rates are legal.

detail. Petitioner's App. at 10a. The Vermont Supreme Court did not specifically address the waiver issue in denying reargument. It simply stated that the City had failed to identify any points of law or fact previously overlooked or misapprehended. Petitioner's App. at 19a.

SUMMARY OF ARGUMENT

This Court should not grant certiorari because the issues Petitioner raises are not based on the holding of the Vermont Supreme Court. Only in *dictum* did the Court below say the City is a "franchising authority" under the Cable Act. The Court did not expressly hold that the rate deregulation provisions of the Act cannot be waived. Thus, the points of law the Petitioner wants clarified are not squarely presented by this case.

Even if the "franchising authority" issue was presented by this case, it does not raise an important federal question. Only a few states have regulatory schemes resembling Vermont's, and because of the City's unique Charter a decision by this Court might have no impact beyond Burlington, Vermont. Petitioner is unable to cite any authority holding that municipalities in its position are not "franchising authorities."

The only rulings on Cable Act rate deregulation hold it non-waivable. The *Erie* case cited by the City is inapposite. It doesn't involve the rate regulating provisions of the Cable Act, its factual setting varies significantly from the case at bar and its holding does not turn on the question of statutory waiver.

ARGUMENT

I. Certiorari Should Not Be Granted to Decide Whether Municipalities In Vermont Are "Franchising Authorities" Under the Cable Act Because That Is Neither the Holding of the Court Below Nor an Important Federal Question.

The City first contends that it is not a "franchising authority" under the Cable Act. The City's contention does not present an important federal question warranting resolution by this Court for two reasons. First, the Vermont Supreme Court's holding was not based on a finding that the City is a franchising authority. Instead, the court below held that the City is a "political subdivision" forbidden from regulating cable rates under the Act. Overturning the Vermont Supreme Court's *dictum* on franchising authorities would not alter the result below. Second, the determination of what constitutes a franchising authority depends on the particular facts and circumstances of each case. Whether the City is a franchising authority turns, in part, on its unique Charter. A ruling on that issue in this case would have extremely limited applicability to other states, and possibly even no applicability to other municipalities in Vermont.

A. The court below held that the City is a "political subdivision" subject to the Cable Act.

The City misstates the Vermont Supreme Court's holding when it claims that the Court held the City to be a "franchising authority" under the Cable Act. Section 543(a) of the Act provides in pertinent part: "Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under

this section." 47 U.S.C. § 543(a). After quoting this section, the Vermont Supreme Court found that:

> A "State" under the Act "means any State, or political subdivision, or agency thereof." 47 U.S.C. § 522(15). The City is such a subdivision and may not regulate except as authorized by the Act. The exceptions are limited and it is not claimed that any apply to the facts of this case.
>
> The City's argument that the Act prohibits only "franchising authorities" from rate regulation overlooks the plain language of the Act, which prohibits rate regulation by a political subdivision. The language in the disputed paragraph of the contract regulates the rates which Mountain may charge during the term of the contract.

Petitioner's App. at 5a.[4] This determination standing alone supports the Vermont Supreme Court's decision.

The Vermont Supreme Court then went on to find, in *dictum*, that the City constitutes a franchising authority and, for that additional reason, is also subject to the rate deregulating provisions of 47 U.S.C. § 543. The Court noted that "[e]ven if we were to accept the City's argument that the Act forbids rate regulation only by franchising authorities, the result would not change." Petitioner's App. at 6a. Thus, the Vermont Supreme Court based its decision that the City cannot regulate cable rates on the unequivocal language of 47 U.S.C. § 543(a) prohibiting rate regulation by any political subdivision, whether or not the City is a franchising authority.

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[4] The trial court based its denial of the City's motion to enjoin the subject rate increase on the same analysis. Petitioner's App. at 27a.

There is no need for this Court to determine whether a municipality in Vermont is a "franchising authority" for purposes of the Cable Act.

B. A ruling under the facts of this case would have very limited applicability.

Even if the City were correct in its characterization of the Vermont Supreme Court's holding, a decision by this Court on whether the City is a "franchising authority" under the Cable Act would have an extremely narrow impact. Thus, an important federal question is not presented here.

The City argues that the "franchising authority" issue is crucial in "states such as Vermont when grant of service territories . . . " and other franchising powers are vested in a state agency. In these states, the City contends that municipalities are not franchising authorities under the Cable Act. However, nowhere in the body of its argument does the City develop this point or tell this Court how many other states are like Vermont. In fact, there are only a handful.[5] Even then, because there are significant differences in those states' regulatory

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[5] Connecticut (Ch. 289, Conn. Gen. Stat. § 16-331 *et seq.*), Rhode Island (R.I. Gen. Laws Ch. 19, § 39-19-8), Alaska (A.L. Stat. § 42.05.010 *et seq.*), and Hawaii (Haw. Revised Stat. Ch. 440(G)). Respondent has only been able to locate three states, Massachusetts, New Jersey and New York, where some cable regulatory powers reside in a state agency, but in all of these states the power to "grant . . . service territories" rests with the municipalities in the first instance. See MGL, Ch. 166A, §§ 1-20; New Jersey Statutes Annotated, Title 48:5A-3; and N.Y.CLS Exec. at § 811 *et seq.*

schemes, there may well be different decisions on the franchising authority issue in each state.

Moreover, there may even be differences among communities in a state like Vermont. The City argues that the Vermont Public Service Board has the sole authority to issue cable television franchises in the state. But the City's Charter arguably gives it the power to regulate a cable television company's use of its streets. Petitioner's App. at 87a-89a. Section 522(9) of the Act defines a "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 1984 U.S. Code Cong. & Ad. News at 4682. And Section 522(8) defines a "franchise" as an "authorization . . . whether such authorization is designated as a franchise, permit, license, or resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system." The Vermont Supreme Court stated:

> In the legislative history, it was noted that in several states the franchising process includes approval by a State agency as well as local government. It was intended in such cases that the term "franchising authority" would include the State agencies as well as "any local government body with authority to grant a franchise. . . ." 1984 U.S. Code & Admin. News, at 4682. The City's charter empowers it to grant franchises for the use of its streets by a cable company and to charge fees for the erection and maintenance of poles and wires in or under its streets. See 1949, No. 298, § 48.

Petitioner's App. at 7a. The charter in another town in Vermont[6] might be different and so, too, the result of a

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[6] Indeed, many Vermont municipalities have no charter issued by the State of Vermont.

"franchising authority" determination. Thus, because the determination of a "franchising authority" not only requires legal but also significant factual findings based on the definitions in the Cable Act, the issue is so particular that a holding by this Court as to Burlington might not even apply to all of Vermont.

Respondent therefore submits that the issue posed by Petitioner is not raised by the holding below nor is it an important federal question. To the contrary, it is an issue of great particularity which must be decided according to the facts of each case.

II. Certiorari Should Be Denied Because Federal and State Courts Uniformly Have Held that the Protections of the Cable Act against Rate Regulation Cannot Be Waived by a Cable Television Operator.

Only two courts have expressly decided whether the protections of the Cable Act against rate regulation can be waived by a cable television operator in an agreement with a political subdivision.[7] Both of these courts held that those protections cannot be waived by the operator. *City of Dubuque v. Group W Cable, Inc.*, No. C 85-1046, slip op. at 4-6 (N.D. Iowa June 18, 1986) (1986 WESTLAW 15646) ("The general rule appears to be that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy . . . By the very

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[7] The City may argue that the Vermont Supreme Court held this *sub silentio* by denying the motion for reargument, but there is no other indication that waiver was considered in this case.

language of the Act it is clear that Congress intended to pre-empt local franchises and create a uniform national policy. To now uphold waivers of that national policy would directly contravene the intent of Congress."); *Nashoba Communications Limited Partnership No. 7, d/b/a Nashoba Cable Services v. Town of Danvers*, No. 88-1743-C (D. Mass. Dec. 30, 1988), *appeal docketed*, No. 89-1338 (1st Cir. April 11, 1989); *see also Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985) at n. 91 (where the Federal Communications Commission noted "that neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements").

Neither these decisions nor the Vermont Supreme Court's opinion below are in direct conflict with *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580 (W.D.Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). The issue in *Erie* was not whether a cable television operator could waive the rate regulation prohibition of Section 543 of the Cable Act, but whether a cable television operator, which had been awarded the City's franchise, could initiate an attack on its agreement by relying on the franchise fee limitations contained in a Federal Communications Commission regulation predating the Cable Act (47 C.F.R. § 76.31 (1980)) and in Section 542 of the Cable Act. The protections of rate deregulation under Section 543 of the Cable Act were not even discussed in the *Erie* case.

In *Erie* the cable television operator brought suit to attack the legality of the franchise fee provision in its contract, whereas in the case at bar the City brought suit

against Mountain to enforce the rate regulating provision in the Agreement. The Vermont Supreme Court weighed the purpose of the Cable Act in the context of a request to enforce the rate regulating provision. Thus it stated:

> The legislative history and the language of the Act evidence the declared policy of Congress to prohibit local governments from regulating basic cable rates after two years from the effective date of the Act. Refusal to enforce an agreement permitting rate regulation is consistent with and essential to effectuate this policy. Enforcement would offend one of the essential purposes of the Act. See *United States v. Mississippi Valley Co.*, 364 U.S. 520, 563 (1961). A term of an agreement is unenforceable if the interest in its enforcement is clearly outweighed by a public policy against the enforcement. See *id.* Here, the stated policy is clear and unequivocal and the enforcement of the contract provision would undermine and detract from that policy.

Petitioner's App. at 6a. In other words, *Erie* may prevent a cable operator from attacking its contractual obligation to pay a franchise fee, but it is a far different matter to hold that parties can contractually bind others to negate a statutory prohibition.

The district court in *Erie* never reached the issue of whether a statutory protection could be waived because it held that the plaintiff's long delay in asserting its rights estopped it, as a matter of law, from even making its claim that the franchise agreement violated its statutory rights. 659 F. Supp. at 587-588. In affirming the decision of the district court, the court of appeals never reached

the statutory waiver issue either.[8] The validity of a Cable Act waiver, therefore, was not a ground for the court of appeals decision.

The court of appeals did, however, discuss the plaintiff's waiver of its constitutional rights. After analysis of the case law, the court of appeals concluded that constitutional rights can be waived if the particular facts and circumstances demonstrate that the waiving party clearly understands what it is doing. 853 F.2d at 1096. The City argues that, if a constitutional right can be waived, then a statutory provision can also be waived. The defect in this argument is twofold. First, a constitutional right runs to a person, whereas a statutory provision, such as the one at bar, runs to the public as a whole. Thus, a person may be able to waive the former (*e.g.*, the right to counsel), but he may not be able to waive the latter (*e.g.*, pollution restrictions). Second, even if a person could waive a particular statutory provision which benefits him, his waiver cannot bind parties not privy to the contract. This is precisely the context in which Mountain's alleged waiver arises. Whatever the nature of Mountain's agreement with the City, the Vermont Supreme Court was obligated to apply the Cable Act. This, of course, was not the situation in *Erie*. Hence, there is no real conflict of authority to be resolved by the exercise of this Court's discretionary jurisdiction.

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[8] It can be argued that the plaintiff's Cable Act claims regarding the franchise fee were not even at issue. Part V of the decision reserves plaintiff's right to renew its claim that the franchise fee exceeds the "mandatory ceiling on franchise fee charges" when the franchise term ends. 853 F.2d at 1103.

CONCLUSION

Petitioner would have this Court decide whether municipalities in Vermont are "franchising authorities" within § 522(9) of the Cable Act, thus subject to the rate deregulating provisions of § 543 of the Act. But the Vermont Supreme Court did not hold that the City is a "franchising authority." The City was found to be subject to § 543 because it is a "political subdivision" of the "State" within §§ 522(15) and 543 of the Cable Act. A ruling on the franchising authority issue would have very limited applicability to other states and municipalities.

Petitioner also assigns error to the Vermont Supreme Court in not finding that Mountain waived rate deregulation under the Cable Act. The Court did not expressly hold that to be the case. Its implied ruling that rate deregulation under § 543(a) of the Act cannot be waived is consistent with the few cases passing on this issue.

The Petition for a Writ of Certiorari to the Vermont Supreme Court should be denied.

Respectfully submitted,

MOUNTAIN CABLE COMPANY

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June 9, 1989